COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2015-SC-000158-D
2013-CA-2165

WANDA JEAN THIELE,
Individually and as Executor of the
Estate of HIRAM CAMPBELL, JR. APPELLANTS

ON APPEAL FROM THE
KENTUCKY COURT OF APPEALS
CASE NO. 2013-CA-002165
(ROCKCASTLE CIRCUIT COURT
v. CIVIL ACTION NO. 11-CI-00329)

KENTUCKY GROWERS INSURANCE COMPANY APPELLEE

BRIEF OF APPELLEE

This is to certify that the within Brief of Appellee was served on this the 2nd day of June, 2016, by first class mail, postage prepaid, addressed to the following: Robert R. Baker, Esq., Rankin & Baker, PLLC, P.O. Box 225, Stanford, KY 40484, and Hon. David A. Tapp, Judge, Rockcastle Circuit Court, Judicial Center, 50 Public Square, Somerset, KY 42501-1486.

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COUNTERSTATEMENT CONCERNING ORAL ARGUMENT

Given the importance of the issues presented in this appeal to Kentucky insurers and insureds, and the Appellant's request that the Court overrule long-standing precedent, the Appellee welcomes the opportunity to participate in oral argument should the Court conclude that it would be helpful to its consideration of this case.

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COUNTERSTATEMENT OF THE CASE

A. Relevant Policy Provisions

In 2004, Kentucky Growers issued a Policy insuring real property, including a residence, owned by Hiram Campbell, Jr. ("Mr. Campbell"), in Rockcastle County, Kentucky. The Policy (R.A. 28 - 53), which self-renewed on November 1, 2011, is attached at Appendix, Tab 1, for the Court's convenience. The Appellant's quotations from the Policy are selective and out-of-order.

At page 5, the Policy extended "Incidental Property Coverage", including coverage for collapse, but only if the collapse was the result of certain identified causes. The Policy also identified specific conditions that did not constitute "collapse": "settling, cracking, shrinking, bulging or expanding". The Policy states:

> 8. Collapse – "We" pay for direct physical loss to property covered under Coverages A, B and C involving the collapse of a building or a part of a building **caused only by the following**:
>
> . . .
>
> (b) **hidden insect** or vermin damage or hidden decay;
>
> . . .
>
> **Collapse does not mean settling, cracking, shrinking, bulging or expanding . . .**

(*Id.*) (emphasis added).

Thus, the Policy provides no coverage for insect damage, unless there is a "[c]ollapse" that is caused by "hidden insects." Further, "collapse" is defined in the Policy as excluding settling, cracking, shrinking, bulging, or expanding.

The Policy exclusions from Incidental Property Coverage begin on the following page. Paragraphs 6 and 7 state:

> 6. SETTLING, CRACKING, SHRINKING, BULGING, or EXPANDING – "We" do not pay for loss caused by the settling, cracking, shrinking, bulging, or expanding of a building, or any part thereof; or to pavements, patios, or any other outdoor structures.
>
> 7. BIRDS, Vermin, Rodents, Insects, or Domestic Animals – "We" do not pay for loss caused by birds, vermin, rodents, insects or domestic animals.

(*Id.*).

The ambiguity about which the Appellant complains is nonexistent: the Policy provides incidental coverage for direct physical loss involving collapse, but only if caused by "hidden insect . . . damage or hidden decay." The Policy then defines "collapse" as not meaning settling, cracking, shrinking, bulging, or expanding. The exclusions are consistent with the coverage.

B. Claim and Denial

Mr. Campbell, to whom the Policy was originally issued, died in December 2005. (R.A. (April 12, 2012, deposition of Wanda Jean Thiele ("Thiele depo."), p. 9)).[1] Between December 2005 and December 2011, the house was occupied by Mr. Campbell's granddaughter, Patricia Michelle Thiele ("Michelle"). (*Id.* at 8-9). Thereafter, Patricia's mother (and Mr. Campbell's daughter), Wanda Jean Thiele ("Ms. Thiele"), also stayed in the house for periods of time. (*Id.* at 9).

In early January 2011, Michelle had a refrigerator in the kitchen moved. At that time, Michelle and Ms. Thiele "discovered that there was some sort of insect debris behind the refrigerator." (*Id.* at 10).

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[1] The deposition was not assigned a page number by the Clerk. Instead, the Case History notes that this document is "INC. SEP." Citations are therefore to the page number of the deposition rather than to the record on appeal.

Ms. Thiele filed a claim with Kentucky Growers on January 3, 2011. Kentucky Growers investigated and discovered (from an estimate submitted by Ms. Thiele (R.A. (Exhibit 4 to Thiele depo.)) that the insect debris was dust from an infestation of termites. On January 20, 2011, Kentucky Growers issued an endorsement to the Policy which states that it "VOIDS AND SUPERSEDES ALL PRIOR ISSUES." (R.A. 53) (a copy of the reissued policy containing the endorsement is hereto attached at Appendix, Tab 2). The endorsement contains the following exclusion:

> It is understood and agreed that "collapse coverage caused by hidden insect damage" is excluded.

Id.

Michelle continued to live in the house until December 2011, when she left for the holidays. (R.A. (Thiele depo. p. 9)). She "intended to continue living there" after the holidays, but died on January 1, 2012. (*Id.*).

Ms. Thiele testified that, as of the date of her deposition (April 12, 2012), the floors of the house were "sagging particularly in the kitchen" but still standing. (*Id.*, p. 21). Although some paneling has come loose and some of the siding has buckled, the walls remain intact. (*Id.*). As of the date of the deposition, and certainly as of the date of the claim, the house was habitable; indeed, Ms. Thiele admitted that she stayed at the house overnight just days before her deposition. (*Id.* at 7).

C. Procedural History

On December 29, 2011, Ms. Thiele, individually and as Executrix of Mr. Campbell's Estate, filed a Complaint in Rockcastle Circuit Court, asserting claims for a declaratory judgment that the Policy covered the claim, a violation of the Kentucky

Unfair Claims Settlement Practices Act, and a request for an award of attorney's fees and interest. (R.A. 1).

On May 2, 2012, and after taking Ms. Thiele's deposition, Kentucky Growers filed a Motion for a Declaratory Judgment that the Policy excluded coverage of the alleged loss. (R.A. 25). Ms. Thiele filed a Response. (R.A. 54). With its Reply, Kentucky Growers filed color photographs of the house. (R.A. 109 - 126). Those photographs are attached for the Court's convenience at Appendix, Tab 3. While those photographs show some bulging and sinking walls, they do not reflect a "collapse" under any definition of the term. Further, the photos were taken almost one year after the discovery of termite debris.

On September 28, 2012, the Circuit Court denied Kentucky Growers' motion for a declaratory judgment, and instead entered judgment in favor of Ms. Thiele. (R.A. 127). The Court identified the "overarching issue" as "the definition of the word 'collapse' as used in the policy." (R.A. 128). The Court specifically acknowledged the following undisputed facts: that the floors were still standing, that the walls were intact, and that "the roof is still intact, and being held by the walls." (R.A. 129). The Circuit Court concluded: "Although this would hardly constitute a total 'collapse' in the traditional sense of the word, applying the majority rule in cases such as this, the Court finds that, at least in a legal sense, a collapse has occurred." (*Id.*). The Court continued:

> The Court makes a factual finding that although Thiele's house is still standing, and in fact it is even habitable to a certain extent, the structural integrity of the building has been compromised. Numerous photographs in the file represent the damage, and in fact, there has been no real disagreement to the fact that damage does exist in the house.

(R.A. 130). The Court made no finding that the home was in a state of actual collapse, or even that collapse was imminent. Based upon its conclusion that a covered loss had already occurred by the time of the January 20, 2011, endorsement, the Court further held the endorsement to be ineffective.

A final and appealable Judgment was entered by the Circuit Court on December 16, 2013. (R.A. 171). Kentucky Growers appealed the ruling to the Court of Appeals which, in a thorough opinion (attached as Exhibit 4 to the Appellant's brief), reversed the conclusion of the Circuit Court. While the Court of Appeals' decision was based partially upon recognition of this Court's decision in *Niagara Fire Ins. Co. v. Curtsinger*, 361 S.W.2d 762 (Ky. 1962), the Opinion did not end there. The Court of Appeals noted that "the *Curtsinger* court's definition of 'collapse' is hardly an aberration as other jurisdictions agree with such definition" (Opinion, p. 8), and cited cases from Alabama, Massachusetts, and Missouri. More importantly, the Court held:

> [e]ven assuming arguendo that Kentucky recognized the majority rule espoused by the trial court, we still must conclude that Thiele has failed to prove that the damage to her house constituted a collapse. As the trial court noted, those jurisdictions adopting the majority rule hold that although the structure need not have collapsed or even be in 'imminent danger' of collapse, 'the damage to it must substantially impair the structural integrity of the building. That is, the damage must alter the basic stability or structure of the building in order to constitute a 'collapse.'

(Opinion, p. 9 (citing Lee R. Russ, et al., Couch on Insurance, § 153:81 (3d ed. 2012).

Reviewing the same photographs that were submitted to the Circuit Court and that Thiele attaches to her brief to this Court, the Court of Appeals found "nothing in the record to conclusively establish that the structural integrity has been 'substantially impaired.'" (*Id.*). On the contrary, the structure remained habitable, as evidenced by the fact that Thiele continued to stay there. (*Id.*). The Court therefore could not "conclude

that the evidence supports a finding that the damage falls within the strict definition of 'collapse' as established in *Curtsinger* **or the more liberal definition adopted in other jurisdictions**." (*Id.*, p. 9-10 (emphasis added)).

ARGUMENT

While Thiele characterizes the question before the Court as whether Kentucky should continue to adhere to *Curtsinger* or join other jurisdictions in adopting a broader definition of "collapse," the issue is considerably more nuanced. Even assuming the Court is inclined to abandon the clarity long provided by *Curstinger* (and by the dictionary), the broader, "majority" definition of collapse does not, as Thiele contends, require a mere showing of impairment of structural integrity. Courts throughout the United States have noted that such a definition would convert a property insurance policy into a maintenance agreement, requiring the insurer to pay for any and all repairs that, left unattended, would eventually imperil the building. Instead, the better-reasoned and more broadly-accepted alternative to the dictionary definition of collapse is an interpretation of the term as requiring, at the least, impairment of the structure that is so substantial as to make collapse imminent, if not actual. Further, if the Court makes such a change in Kentucky law, the ruling should apply only prospectively, and not to policies already negotiated and priced in accordance with *Curtsinger*.

Regardless, however, the outcome of this case remains the same: as the Court of Appeals noted, the condition of the structure in this case fails to satisfy even the more liberal understanding of "collapse" coverage as applying to actual as well as imminent collapse. And, even if the structure here could be said to be in a state of collapse, the Policy provides coverage only if that condition is caused by hidden insect damage. After

Michelle's discovery in January 2011 (a date on which the structure was indisputably not in a state of "collapse," however that term is defined), the damage was clearly no longer hidden.

A. Pursuant to the Unambiguous Terms of the Policy, and Kentucky Law, the Alleged Loss Does Not Involve a "Collapse" and Is Not Covered

Ms. Thiele's effort to create an ambiguity between the Policy's coverage provisions and its exclusions must fail. The Policy clearly states what "collapse" does not mean: "Collapse does not mean settling, cracking, shrinking, bulging or expanding . . . ." Insurance policies routinely define a term by stating what it does not mean, and this does not by itself create an ambiguity. *Pridham v. State Farm Mut. Ins. Co.*, 903 S.W.2d 909, 910-11 (Ky. App. 1995) (policy excluded from definition of "underinsured motor vehicle" those vehicles owned or regularly used by the insureds). Even if the Policy was silent as to what a "collapse" did not mean, a lack of a definition does not itself necessarily render a policy ambiguous. See, e.g., *True v. Raines*, 99 S.W.3d 439, 444 (Ky. 2003), as amended (April 2, 2003) (policy's failure to define "driver" does not constitute an ambiguity). This is especially true where the term at issue, "collapse," has "a well-understood common meaning." *Niagara Fire Ins. Co. v. Curtsinger*, 361 S.W.2d 762, 764 (Ky. 1962).

In *Curtsinger*, this Court's predecessor held that the word "collapse," as used in an insurance policy, has an unambiguous and plain meaning. The Court interpreted a policy covering losses caused by "[c]ollapse of the building or any part thereof." After excessive rainfall apparently eroded the fill ground beneath the insured house, the residents awoke to find that the porch floor and roof had "broken loose from the house, and the front 'had gone down about a foot.'" *Id.* Within a month, large cracks developed

in the basement wall and floor, and a carport roof sagged and pulled away from the adjoining wall by an inch. The Court held that the term "collapse" has a well-known, ordinary meaning:

> **The word 'collapse' in connection with a building or other structure has a well-understood common meaning.** Webster's Collegiate Dictionary defines the word as, '(1) **To break down or go to pieces suddenly, especially by falling in of sides; to cave in.**' . . . .

Id. at 764 (emphasis added). In light of that meaning, the damage to the house could not qualify as a collapse as a matter of law:

> It seems to us that the mere subsidence of the floor of the porch, which pulled it and the roof away from the building a few inches, cannot be regarded as collapse of any part of the building, and that the trial court should have so ruled as a matter of law.

Id. at 764-65.

Thiele asks this Court to overrule *Curtsinger*, contending that it is at odds with an alleged majority rule adopted by other jurisdictions.[2] While it is true that Courts throughout the United States have not agreed on the definition of "collapse" in the context of property insurance policies, *Curtsinger* is neither an aberration nor a fossil. In cases both recent and dated, numerous other jurisdictions have agreed with the *Curtsinger* understanding of the term "collapse." In *Heintz v. U.S. Fidelity and Guar.*

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[2] In the alternative, Thiele has argued in the lower Courts that *Curtsinger* does not apply to this case because that alleged collapse concerned a porch. Thiele has offered no rationale, however, for the theory that the term "collapse" should have a different meaning when applied to part of a building rather than to the whole. The *Curtsinger* opinion itself is not limited to a porch, or to a collapse resulting from any particular cause. Indeed, the *Curtsinger* Court relied on out-of-state cases finding no "collapse" of a house that had cracked walls and foundation due to moving or settling (*Central Mut. Ins. Co. v. Royal*, 113 So.2d 680 (Ala. 1959)), and of a hotel addition that had a hole in its walls caused by a runaway railroad car (*Skelly v. Fidelity & Casualty Co. of New York*, 169 A. 78 (Penn. 1933)).

Co., 730 S.W.2d 268 (Mo. App. 1987), for example, the policy at issue contained language almost identical to the Kentucky Growers Policy in this case. The *Heintz* policy covered "risk of direct physical loss to covered property involving collapse of a building or any part of a building caused only by . . . hidden decay . . . ." *Id.* The insured testified that the studding, sheathing, and lath of the east and west walls of his home had rotted and deteriorated, and that the walls "probably would" collapse. The insurer's engineer stated that it was possible that the home would collapse in the absence of repairs. However, the undisputed evidence in *Heintz*, as in this case, was that there had not yet been any "falling or collapsing of any of the walls." The Court held that the insurer was therefore entitled to a judgment as a matter of law:

> There must have been a falling down or collapsing of a part of a building. A condition of impending collapse is insufficient . . .
>
> Although the decay of the interior supporting structure of the wall may lead to the collapse of the wall, insured admits that the walls of his home have not yet collapsed. **Without actual collapse, there is no recovery**. . .

Id. at 269 (emphasis added).

Similarly, in *Clendenning v. Worcester Ins. Co.*, 700 N.E.2d 846 (Mass. App. 1998), the insured discovered extensive carpenter ant damage to the front and side porches and to the garage. A structural engineer testified that the damage was so significant that, had the insured not razed the porches and garage, "reinforcement would have been inadequate to remedy the problem" and the structures would have presented concerns "from a safety standpoint." Like the Kentucky Growers Policy, the policy considered in *Clendenning* excluded coverage for a loss caused by insects, but covered a collapse caused by hidden insect damage. The Court therefore considered the dictionary definition of the term "collapse":

> 1: to break down completely . . . 2: to fall or shrink together abruptly and completely . . . 3. To cave in, fall in, or give way . . . 6: to fold down into a more compact shape . . .
>
> and as noun:
>
> 2: the action of collapsing . . . 3a: . . . sudden failure . . . .

Id. at 848 (citing Webster's Third New International Dictionary 443 (1993)). The Court noted that those definitions encompass "both a temporal element of suddenness (though the noun may accommodate a gradual loss of structure) and a visual element of altered appearance that comprises a structural collapse, **distinct from the degenerative process causing the collapse**." *Id.* (emphasis added). The Court found that the structure could not satisfy the definition:

> The policy expressly excludes damage caused by insects, except as may be hidden and which results in a collapse of all or part of the structure. **The hidden destructive process must run its full course to be insurable. Anything short of that is expressly excluded under the policy**. A collapse, within the meaning of the policy, is a perceptible event or state caused by a specific degenerative process, here, the patient gnawing of swarms of carpenter ants. There are no degrees of collapse. The policy does not cover "imminent" collapse, as [the insured] argues; it only covers the collapse . . . .

Id. (citations omitted) (emphasis added). See also *State Farm & Fire Cas. Co. v. Slade*, 747 So.2d 293 (Ala. 1989) (no collapse coverage where insureds could "point to no evidence indicating that any part of their home had actually fallen in, i.e., collapsed, or that the structural integrity of their home was so damaged that their home was unfit for human habitation"); *Olmstead v. Lumbermens Mut. Ins. Co.*, 259 N.E.2d 123, 126 (Ohio 1970) (finding no ambiguity in the word "collapse," which, "in its plain, common and ordinary sense, means a falling down, falling together, or caving into an unorganized mass"); *Driscoll v. Providence Mut. Fire Ins. Co.*, 867 N.E.2d 806 (Mass. App. 1976)

(damage in the form of outward-leaning walls, cracks in the ceiling and interior walls, and a two-inch drop in the roof was not a "collapse"); *Gage v. Union Mut. Fire Ins. Co.*, 169 A.2d 29 (Vt. 1961) (buckled ceiling, raising of floor in the center with consequent splitting of linoleum, out-of-line and bent plumbing, and a splitting of the fireplace and pulling away of the chimney did not constitute collapse).

B. Any Change In Kentucky Law Regarding the Meaning of "Collapse" For Purposes of Property Insurance Coverage Should Apply Only Prospectively

For the past fifty (50) years, Kentucky insurers have drafted and priced insurance contracts with the understanding that *Curtsinger* governs. The position expressed in *Curtsinger* – that "collapse" has an ordinary and unambiguous meaning, and does not include a slow degeneration – continues to be embraced in numerous other states. Any departure from *Curtsinger* would mark a significant change in Kentucky law governing property insurance coverage, and that change should not apply retroactively.

As pointed out in the Amicus brief tendered by the American Insurance Association and Insurance Institute of Kentucky in this case, this Court has "generally made decisions prospective only when overruling old precedent upon which the losing party has relied." *Branham v. Stewart*, 307 S.W.3d 94, 102 (Ky. 2010). In particular, the Court has applied changes in the law prospectively in the context of insurance law, recognizing that insurers rely upon existing case law when drafting – and pricing – their policies. See *Mutual Life Ins. Co. v. Bryant*, 177 S.W.2d 588 (Ky. 1943) (overruling prior law regarding interpretation of disability insurance policies, but with the qualification that "policies issued after this decision becomes final will be controlled by the conclusions expressed herein"); *World Fire & Marine Ins. Co. v. Tapp*, 130 S.W.2d 848, 852 (Ky. 1939), overruled on other grounds in *Home Ins. Co. v. Cohen*, 357 S.W.2d 674 (Ky. App.

1962) ("Policies issued after this decision becomes final will be controlled by the conclusion expressed herein").

C. Even If the Court Overrules *Curtsinger*, Thiele Is Not Entitled to Coverage

1. Even if the Court abandons Curtsinger, the alternative (and majority) interpretation of "collapse" requires that collapse be actual or imminent, and Thiele cannot satisfy that standard.

Even if the Court abandons the long-standing and clear-cut rule set out in *Curtsinger*, the alternative (and majority) approach is not to find coverage where there is a mere impairment of structure integrity, but only where that impairment results in either actual or imminent collapse. The Court of Appeals correctly concluded that Thiele could not satisfy this standard, even if it applied.

Thiele argues for a definition of collapse that would provide coverage in cases where a collapse might occur someday if repairs are not performed, or where the cost of repair exceeds the cost to rebuild. Most Courts have rejected such an expansive interpretation of the term; even those departing from the traditional definition of "collapse" have found coverage only where collapse is actual or "imminent." This standard prevents the insurance policy from being converted into a maintenance policy, requiring the insurer to cover the cost of repairing any condition that, left unattended, might eventually imperil the integrity of the structure.

In *Buczek v. Continental Cas. Ins. Co.*, 378 F.3d 284 (3rd Cir. 2004), for example, the insured property was built on filled marshland and supported by pilings. After noticing that the building was "swaying in the wind," the owners investigated and discovered that the pilings had rotted due to wood boring beetles and fungi. The policy covered "collapse" by hidden decay. Although declining to limit coverage to an "actual

collapse", the Court held that the structure could not even meet the broader definition of "imminent collapse." The Court noted that "imminent" means "ready to take place: near at hand" and "likely to occur at any moment impeding" or "likely to happen without delay". *Id.* at 291. Although expert testimony established that the house could collapse in the face of high winds, this was not enough.

Similarly, in *Doheny West Homeowners' Ass'n v. American Guarantee*, 60 Cal. App. 4th 400 (Cal. App. 1997), the policy covered collapse only due to specified causes, including hidden decay. While the pool and parking structure had substantial spalling and cracking, and an engineer had reported that the "extensive" damage made it likely that a California earthquake could cause a complete collapse, the Court found no coverage. To be covered, "collapse must be imminent and inevitable, or all but inevitable." *Id.* This requirement "avoids both the absurdity of requiring an insured to wait for a seriously damaged building to fall and the improper extension of coverage beyond the terms of the policy" as well as "converting th[e] insurance policy into a maintenance agreement . . . ." *Id.* at 264. "Imminent" was defined as "likely to happen without delay; impending, threatening" or "likely to occur at any moment, impending." *Id.* at 406. Because the engineer testified that the building was safe and not in danger of falling down, the Court found no collapse.

It is important to note that the Policy issued by Kentucky Growers provided coverage only for "direct physical loss" of property involving collapse and not, more broadly, for the "*risk of* direct physical loss" involving collapse. The distinction is an important one:

> A policy covering "*risks* of direct physical loss *involving* collapse," (emphasis added) as the court noted, "appears to cover even the threat of

> loss from collapse." Here, however, General Star's policy provides coverage for "direct physical loss or damage to Covered Property, *caused by* collapse of a building or any part of a building" (emphasis added). This policy language requires not just the threat of collapse, and not just collapse itself, but actual loss or damage caused by a collapse.

Hilton Head Resort Four Seasons Centre Horizontal Property Regime Council of Co-Owners, Inc. v. General Star Indemnity Co., 357 F.Supp.2d 885 (D.S.C. 2005).[3] The broader "risks" language is present in many of the cases cited by Thiele. See, e.g., *Assurance Co. of America v. Wall & Associates LLC of Olympia*, 379 F.3d 557, 582 (W.D. Wash. 2004) (noting that language providing coverage for "*risk of* direct physical loss involving collapse" supports a finding of broader coverage) (emphasis added) (cited at Appellant's Brief, p. 9);[4] *Whispering Creek Canyon Condominium Owners Association v. Alaska National Ins. Co.*, 774 P.2d 176 (Alaska 1989) (policy insured against "risk of direct physical loss involving collapse") (cited at Appellant's Brief, p. 9). The distinction is an important one: a policy providing coverage for direct physical loss involving

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[4] *Wall* was a prediction on the part of the United States Court of Appeals for the Ninth Circuit as to how a Washington state court might interpret the term "collapse" in a property insurance policy. That Court's prediction, however, was called into doubt in a more recent federal case applying Washington law, *Queen Anne Park Homeowners Association v. State Farm Fire & Casualty Co.*, 2012 WL 5456685 (W.D. Wash. 2012), which clarified that Washington state courts are unlikely to equate the "imminent collapse" standard with mere "substantial impairment." In *Queen Anne Park*, the Court cited *Ocean Winds*, discussed below, to conclude that the "substantial impairment" standard would improperly convert the policy into a maintenance agreement. The Court noted that "the more rigorous 'imminent collapse' standard, which requires proof that 'collapse is likely to happen without delay,'" reasonably protects insureds while also encouraging them to mitigate damages by performing necessary repairs to prevent an actual collapse. "[T]he Court concludes that, even if Washington were to adopt a relaxed standard that is somewhere short of 'rubble on the ground,' it would require an insured seeking coverage under a collapse provision to show, in addition to a substantial impairment of structural integrity, **an imminent threat of collapse**." *Id.* at *4 (emphasis added).

collapse is "markedly different" and narrower than a policy providing coverage for mere risks of physical loss involving collapse. The latter type of policy "appears to cover even the threat of loss from collapse." *Hilton Head Resort*, 357 F.Supp.2d at 888.[5]

Even where the policy more broadly covers "risks" of loss involving collapse, as opposed to only direct physical loss involving collapse, however, a standard requiring at least "imminent collapse" is the better-reasoned approach:

> [C]ourts rejecting the "substantial impairment" standard have noted, collapse coverage should not be converted into a maintenance agreement by allowing recovery for damage which, while substantial, does not threaten collapse. *See Doheny West, supra; Clendenning v. Worcester Ins. Co.*, 45 Mass.App.Ct. 658, 700 N.E.2d 846 (1998).
>
> We find a requirement of imminent collapse is the most reasonable construction of the policy clause covering "risks of direct physical loss involving collapse." We define imminent collapse to mean collapse is likely to happen without delay. This construction protects the insured without distorting the purpose of the clause to protect against damage from collapse. The policy at issue therefore requires proof of imminent collapse for coverage to be triggered.

Ocean Winds Council of Co-Owners, Inc. v. Auto-Owner Ins. Co., 565 S.E.2d 306, 308 (S.C. 2002).

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[5] Other cases cited by Thiele in support of her request that this Court overrule *Curtsinger* (Brief, p. 9-10) are distinguishable on other grounds. In *Thornewell v. Indiana Lumbermens Mutual Ins. Co.*, 147 N.W.2d 317 (Wis. 1967), the Court did not require merely an impairment of structural integrity, but also a finding that the cracked and bulging walls had "failed in their function to support the house." *Id.* at 321. Although the walls in that case had bulged two inches, "they had not fallen and there was no evidence they were in any immediate danger of falling." Therefore, there was no "collapse" within the meaning of the Policy. *Weiner v. Selective Way Insurance Co.*, 793 A.2d 434, 443 (Del. 2002), did not require simply substantial impairment in order to find a building in a state of collapse, but instead held that "collapse" covers "any serious impairment of structural integrity **that connotes imminent collapse** threatening the preservation of the insured property." (Emphasis added).

The "majority view," if the Court is inclined to adopt it, then, is not an interpretation of "collapse" as providing coverage where the structural integrity of the insured property is merely impaired, but where collapse is actual or imminent. See *Fantis Foods, Inc. v. North River Ins. Co.*, 753 A.2d 176 (N.J. Super. 2000) (under "majority view," to which New Jersey adheres, "collapse" coverage may be taken "to cover any serious impairment of structural integrity that connotes imminent collapse threatening the preservation of the building as a structure or the health and safety of occupants and passers-by"). *Id.* at 183. Thiele cannot satisfy this standard.

The most that may be said for Thiele's claim for coverage is that the house is so extensively damaged that it may someday fall down, and that an engineer has concluded that repair is not economical. (R.A. (Thiele depo., p. 22-23); R.A. 53). This does not satisfy even the broader meaning of collapse adopted by the majority of other jurisdictions. The Policy does not provide coverage for a collapse that may occur someday, or for termite damage that is so extensive that it would cost more to repair the house than to rebuild it. Instead, the Policy clearly excludes coverage for insect damage unless that damage is "hidden" and unless it causes a "collapse."[6] While parts of the kitchen floor are allegedly "sagging," and while some of the siding has bulged, these conditions are specifically excluded in the Policy's definition of the term "collapse":

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[6] The fact that the Policy limits coverage to a collapse caused by "hidden" decay or "hidden" insect damage further underscores that "collapse" must be read in its ordinary sense to refer to an event which has either occurred or which is highly imminent. If the parties had intended for coverage to extend to gradual deterioration or a falling-down long after the cause was known to the insured, then coverage would not have been limited to collapses due to "hidden" causes. Instead, the parties intended coverage only for collapse - a sudden and completed event resulting from an as-yet-unknown cause.

"Collapse does not mean settling, cracking, shrinking, bulging or expanding." (R.A. 36). In other words:

> The policy on which this suit was brought did not insure against 'collapse' and stop. It carried a plain exclusion of 'settling, cracking, shrinkage or expansion of pavements, foundations, walls, floor or ceilings' from coverage.

Eaglestein v. Pacific Nat. Fire Ins. Co., 377 S.W.2d 540, 545 (Kan. 1964) (holding that the sinking and settling of part of a house did not constitute "collapse" within the meaning of the policy).

As a matter of undisputed fact, the walls and floor of the residence are intact. The house is habitable; indeed, Ms. Thiele stayed at the house overnight just days before her deposition. (R.A., Thiele depo., p. 7). Whether the Court applies *Curtsinger*, on which Kentucky insurers and insureds have long relied, or adopts a more open-ended definition of "collapse," the Policy does not provide coverage here. This is confirmed by a comparison of the state of the insured house in this case with the structures found by other Courts as satisfying the broader definition of collapse. Cf. *Fidelity and Casualty Co. of New York v. Mitchell*, 503 So.2d 870 (Ala. App. 1987) (where stairway and surrounding area had fallen eight inches away from the primary walls, and center of the floor had fallen toward the middle of the house, definition of "collapse" was satisfied); *Beach v. Middlesex Mut. Assur. Co.*, 532 A.2d 1297 (Conn. 1987) (collapse coverage existed where the foundation wall had a nine-inch crack and had separated from the building wall, and where support beams on top of the foundation had also separated); *Whispering Creek Condominium Owner Ass'n*, 774 P.2d 176 (coverage where roof had deteriorated to the point where local authorities had determined it was not capable of supporting water or snow, and building "was in a life-threatening condition and in

imminent danger of collapse"); *Assurance Co. of America*, 379 F.3d at 559 (finding coverage existed for actual as well as imminent collapse, including where, with the slightest touch, brick facades "simply fell off the building").

Many of Thiele's descriptions of the photographs of the residence (Brief, p. 7-8) are synonymous with precisely what the Policy expressly excludes from the meaning of "collapse". She describes a stovepipe as having "pulled out"; the wall paneling as "moving away" from the chimney, and a "bulge" at the bottom of paneling. While parts of the kitchen floor are allegedly "sagging," and while some of the siding has bulged, these conditions are specifically identified in the Policy as not constituting "collapse": "Collapse does not mean settling, cracking, shrinking, bulging or expanding." (R.A. 36 (Policy, Paragraph 8)).[7]

Setting aside Thiele's descriptions, however, the photographs speak for themselves: they show an inhabited residence (albeit in disrepair) with intact walls and floors that are in no sense broken down, in pieces, fallen-in, or caved-in. Even if the Court abandons *Curtsinger* in favor of a more open-ended meaning of "collapse," therefore, there would be no coverage here.

2. Even if the residence eventually "collapses," the insect damage is no longer hidden and the loss is not covered.

Of course, even if the Court adopts a new and broader meaning of the term "collapse," and even if the Court could conclude from Ms. Thiele's descriptions and photographs that some material issue of fact existed with regard to whether the structure

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[7] *Thornewell v. Indiana Lumbermens Mut. Ins. Co.*, 147 N.W.2d 317 (Wis. 1967), cited by Thiele, concluded that "cracked and bulged walls . . . cannot under any theory be considered in a state of collapse."

satisfied that new meaning, the analysis does not end there: for coverage to exist, the collapse must be attributable to one of the enumerated causes in the Policy, namely, here, "hidden" insect damage. The Policy does not provide coverage for collapse caused by insect damage unless it is hidden.

Ms. Thiele testified that Michelle discovered evidence of an infestation in January 2011. She continued to live there after the termites were discovered and until the December 2011 holidays, and would have resumed living there but for her death on January 1, 2012. For at least one year after the discovery of termites, therefore, the house remained standing and obviously habitable – and, therefore, in a condition that cannot possibly be deemed a "collapse" under any definition of the term. If the condition of the building devolved to a "collapsed" state after January 1, 2012, then that "collapse" cannot be attributed to hidden insect damage. By that date, the damage was not hidden.

"Hidden" means "out of sight or not readily apparent" or "obscure, unexplained, undisclosed." (Merriam-Webster Dictionary). The term cannot be expanded to embrace insect damage that has been observable to and known by the insured for more than one year. See *Wurst v. State Farm Fire & Cas. Co.*, 431 F.Supp. 2d 501, 506 (D.N.J. 2006) (no coverage for collapse of basement due to "hidden decay" because insured noticed cracks on the face of the foundation prior to the collapse itself). If the residence may be said to have collapsed at all, then that "collapse" clearly occurred more than a year after January 2011 and it cannot be attributed to "hidden" insect damage.

D. The January 20, 2011 Reissued Policy Containing the Endorsement Excluded Coverage for Any "Collapse" That Occurred After That Date

Effective January 20, 2011, Kentucky Growers issued and the Plaintiff accepted an endorsement to the Policy which excludes "collapse coverage caused by hidden insect

damage." (Appendix, Tab 2). No evidence in the record indicates that the house was in a state of collapse – under any conceivable interpretation of that word – as of January 20, 2011. While Thiele attempts to characterize the endorsement as constituting a change in Kentucky Growers' position, the reason for the endorsement was clear: the insect damage was no longer hidden and, at the time the endorsement issued, there had been no collapse. The endorsement is well supported by public policy reasons: a homeowner has a duty to protect his or her property interest from demise or ruin, a property interest shared by his or her insurer. A homeowner who observes a massive infestation, such as that observed in the home at issue in this case, cannot sit idly by and watch the foundation and timbers crumble for months until the occurrence of the inevitable outcome– a sudden collapse. A homeowner has a duty to take the appropriate steps to rid the home of the insect nuisance, and the failure to do so is at the homeowner's (not the insurer's) risk.

Because, at the time of the endorsement, a "collapse" caused by hidden insect damage had not happened, there was nothing nefarious about the modification of coverage. On the contrary, and provided that an insured is clearly advised of the change, an amendatory endorsement excluding a particular loss will "validly modify the original terms of a policy." *Hodgin v. Allstate Ins. Co.*, 935 S.W.2d 614, 615 (Ky. App. 1997). See also *Goodin v. General Acc. Fire & Life Assur. Corp.*, 450 S.W.2d 252, 256 (Ky. 1970) (an endorsement will prevail over any conflicting provisions of the policy). Ms. Thiele testified that she received the January 20, 2011 Endorsement and understood that it was an amendment to the Policy that was in effect at the time the claim was made. (R.A., Thiele depo., p. 27-28).

Because the endorsement effectively amended the Policy, the Plaintiff is entitled to coverage only if a "collapse" caused by "hidden insect damage" occurred prior to January 20, 2011, the effective date of that endorsement. The Policy does not provide coverage for insect damage – hidden or unhidden – but only for a collapse caused by hidden insect damage. "Exposure to termites can cause the collapse, but the exposure itself does not trigger coverage, only a collapse." *Davidson v. United Fire & Casualty Co.*, 576 So.2d 586 (La. App. 1991). "[I]rrespective of when the process began that eventually led to the collapse, in order to have coverage the evidence must preponderate that the extensive damage (assumed to be a collapse) occurred during one of the policy periods." *Id.* at 590. The fact that the insured discovered a progressive condition which would eventually cause a structure to reach a collapsed state cannot extend coverage beyond the effective dates of the policy. *Mercer Place Condominium Assoc. v. State Farm Fire & Casualty*, 17 P.3d 626 (Wash. App. 2001). Simply stated, "[t]he structure is either in a 'collapse' condition or it is not." *Id.* at 629.

In *Mercer Place Condominium Assoc., supra*, the insurer paid for the portions of the building that were in a collapsed state due to decay and then cancelled the policy. The Court rejected the insured's argument that the policy should cover damage that, given the progressive nature of decay, would eventually reach a collapsed state after the cancellation date:

> [U]nder this policy **the predicate for coverage is collapse, not the precursors of collapse** such as dry rot, water seepage, or design or construction defects leading to such losses. Since the policy specifically excludes coverage for damage from hidden decay that has not yet reached a point of collapse during the policy period, collapse that occurs after the policy period is specifically excluded from coverage.

Id. at 630 (emphasis added).

The result must be the same here. Coverage for a collapse due to hidden insect damage extended only until January 20, 2011. Prior to that date, there was nothing more than an exposure to termite damage – at most, a "precursor" of collapse. And, well after that date, Michelle continued to live in the house with no plans to leave. Even if the Plaintiff could somehow establish that the house is now in a state of collapse (despite Ms. Thiele's testimony that the walls and floors are intact and that the house is apparently habitable), no evidence whatsoever suggests that it was in such a state on or prior to January 20, 2011, when Kentucky Growers excluded coverage for collapse.

CONCLUSION

Curtsinger has provided both insurers and insureds with decades of clear guidance as to what will and will not constitute "collapse" for purposes of property insurance. If the Court decides to abandon *Curtsinger*, it should not be in favor of a rule that coverage will exist upon a finding of mere structural impairment. Such an interpretation is at odds with the language of the Policy (which very clearly explains what "collapse" is *not*), is not representative of the "majority rule," and would convert the insurance policy into a maintenance agreement, requiring payment any time the insured discovered a condition that, left untreated, might someday render the building uninhabitable. Finally, any overruling of *Curtsinger* must be on a prospective basis only, and even the most liberal interpretation of the term "collapse" will not provide coverage where it has been caused insect damage that can no longer be said to be hidden.

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